

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

NATRONE BOSTICK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable James W. Lawler

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
tom@washapp.org

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT	1
B. ASSIGNMENT OF ERROR	1
C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.....	1
D. STATEMENT OF THE CASE.....	2
E. ARGUMENT	3
The trial court failed to make a sufficient inquiry regarding Mr. Bostick’s ability to pay prior to imposing attorney’s fees.	3
a. <i>The court may impose court costs and fees only after an individualized inquiry regarding an ability to pay.</i>	3
b. <i>The trial court failed to make a sufficient individualized inquiry into Mr. Bostick’s present and future ability to pay the LFOs.</i>	5
c. <i>This Court should exercise its discretion and find the inquiry here utterly incomplete.....</i>	9
d. <i>The remedy for the court’s failure to inquire into Mr. Bostick’s financial circumstances and make a finding of her ability to pay the LFOs is remand for a new sentencing hearing.....</i>	10
F. CONCLUSION	11

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>City of Richland v. Wakefield</i> , ___ Wn.2d ___, 380 P.3d 459 (2016).....	7
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	passim
<i>State v. Cardenas-Flores</i> , 194 Wn.App. 496, 374 P.3d 1217 (2016).....	9
<i>State v. Curry</i> , 118 Wn.2d 911, 829 P.2d 166 (1992)	8
<i>State v. Duncan</i> , 185 Wn.2d 430, 374 P.3d 83 (2016)	9
<i>State v. Mayer</i> , 120 Wn.App. 720, 86 P.3d 217 (2004)	8
<i>State v. Nolan</i> , 98 Wn.App. 75, 988 P.2d 473 (1999)	3
<i>State v. Thompson</i> , 153 Wn.App. 325, 223 P.3d 1165 (2009)	8

STATUTES

RCW 10.01.160	4, 5, 6
RCW 10.46.190	9
RCW 9.94A.589	3

RULES

GR 34.....	6, 7
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A. SUMMARY OF ARGUMENT

Natrone Bostick pleaded guilty and was sentenced one count each of first degree kidnapping and first degree assault. The trial court imposed over \$2100 in discretionary legal financial obligations (LFOs) without making an adequate individualized inquiry into Mr. Bostick's current or future ability to pay as required. Mr. Bostick is entitled to reversal and remand for resentencing.

B. ASSIGNMENT OF ERROR

The trial court failed to conduct an adequate inquiry into Mr. Bostick's ability to pay prior to imposing LFOs.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Prior to imposing discretionary LFOs, the trial court must engage in an individualized inquiry into the defendant's present and future ability to pay prior to making a finding that he has an ability to pay the LFOs. The court here imposed over \$2172.50 in discretionary LFOs without making an adequate inquiry into Mr. Bostick's financial circumstances or his future ability to pay. Is Mr. Bostick entitled to reversal of his sentence and remand for a new sentencing hearing?

D. STATEMENT OF THE CASE

Natrone Bostick pleaded guilty to one count of first degree kidnapping and one count of first degree assault. CP 17-27; 6/9/2016RP 3-8. The trial court imposed the agreed sentence of 180 months, the sentences of the two offenses running consecutive as serious violent offenses. CP 6/16/2016RP 6.¹

Prior to imposing LFOs, the court inquired of Mr. Bostick:

With regard to the financial obligations, is there any physical or emotional or any other reason why you can't work and earn a living when you're out if you're not in custody?

MR. BOSTICK: No, Your Honor.

THE COURT: It's a matter of finding work and getting a job?

MR. BOSTICK: Yeah.

THE COURT: All right. So based on that, I'll make the finding that you have the future ability to make payments on the financial obligations which I will impose: \$500 crime victim assessment, *\$200 filing fee*, *\$1,972.50 attorney fee*, \$100 attorney fee. I'm not imposing the additional jail fee on that, given the total financial obligations here. \$25 a month starting 60 days from today's date.

¹ RCW 9.94A.589(1)(b) requires serious violent offenses that arise from separate and distinct conduct to be consecutive.

6/16/2016RP 6-7 (emphasis added). This ruling was reinforced in a subsequent order amending the Judgment and Sentence to reaffirm the imposition of \$1927.50 in attorneys' fees. CP 39-40.

E. ARGUMENT

The trial court failed to make a sufficient inquiry regarding Mr. Bostick's ability to pay prior to imposing attorney's fees.

- a. *The court may impose court costs and fees only after an individualized inquiry regarding an ability to pay.*

The allowance and recovery of costs is entirely statutory. *State v. Nolan*, 98 Wn.App. 75, 78-79, 988 P.2d 473 (1999). Under RCW 10.01.160(1), the court can order a defendant convicted of a felony to repay court costs as part of the judgment and sentence. RCW 10.01.160(2) limits the costs to those "expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under 10.05 RCW or pretrial supervision."

However, RCW 10.01.160 (3) states that the sentencing court cannot order a defendant to pay court costs "unless the defendant is or will be able to pay them." *See also State v. Blazina*, 182 Wn.2d 827, 837-38, 344 P.3d 680 (2015) (citing RCW 10.01.160 and requiring court to make individualized inquiry into defendant's ability to pay). In making that determination, the sentencing court must take into

consideration the financial resources of the defendant and the burden imposed by ordering payment of court costs.

Blazina held:

“[t]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them.” [citation omitted] To determine the amount and method for paying of costs, “the court *shall* take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” [citation omitted]

Id., citing RCW 10.01.160 (3) (emphasis in original).

The *Blazina* Court stressed the policy underlying its concern regarding the impact of LFOs on those unable to pay. The Court noted that LFOs accrue 12% interest and many defendants simply cannot pay. *Blazina*, 182 Wn.2d at 836-37. The inability to pay off the LFOs means that courts retain jurisdiction over these individuals long after they are released from prison, which can have serious negative consequences on employment, on housing, and on finances. This impacts credit ratings, making it more difficult to find secure housing. *Id.*

The court’s inquiry here was insufficient under *Blazina* and, as a result, Mr. Bostick is entitled to a new sentencing hearing.

- b. *The trial court failed to make a sufficient individualized inquiry into Mr. Bostick's present and future ability to pay the LFOs.*

In *Blazina*, the Supreme Court ruled that the trial court *must* make an individualized inquiry into the defendant's financial circumstances and his current and future ability to pay when imposing discretionary LFOs. *Blazina*, 182 Wn.2d at 837-38. In addition, the record must reflect this individualized inquiry:

The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors, as amici suggest, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

Id. (emphasis added).

Here, the trial court failed to make a sufficient individualized inquiry required under RCW 10.01.160. 6/16/2016RP 6-7. At sentencing, the court merely asked Mr. Bostick if he could get a job after he was released, and when Mr. Bostick answered affirmatively, the court imposed the costs. *Id.* These rhetorical questions by the trial court were useless in determining whether Mr. Bostock had an ability to pay. It seems clear based upon the inquiry that the court was intending to impose the LFOs regardless of Mr. Bostick's answers.

In making its ability to pay determination, the *Blazina* Court strongly advised courts to use the guidelines listed in GR 34. Under GR 34, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. *Blazina*, 182 Wn.2d at 838-39.² In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *Id.*

² GR 34 states in relevant part:

- (3) An individual who is not represented by a qualified legal services provider (as that term is defined below) or an attorney working in conjunction with a qualified legal services provider shall be determined to be indigent within the meaning of this rule if such person, on the basis of the information presented, establishes that:
- (A) he or she is currently receiving assistance under a needs-based, means-tested assistance program such as the following:
 - (i) Federal Temporary Assistance for Needy Families (TANF);
 - (ii) State-provided general assistance for unemployable individuals (GA-U or GA-X);
 - (iii) Federal Supplemental Security Income (SSI);
 - (iv) Federal poverty-related veteran's benefits; or
 - (v) Food Stamp Program (FSP); or
 - (B) his or her household income is at or below 125 percent of the federal poverty guideline; or
 - (C) his or her household income is above 125 percent of the federal poverty guideline and the applicant has recurring basic living expenses (as defined in RCW 10.101.010(4)(d)) that render him or her without the financial ability to pay the filing fees and other fees or surcharges for which a request for waiver is made; or
 - (D) other compelling circumstances exist that demonstrate an applicant's inability to pay fees and/or surcharges.

GR 34(a)(3).

The Court has subsequently reaffirmed the *Blazina* ruling in *City of Richland v. Wakefield*:

[W]e reiterate our instruction from *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015): *courts can and should use GR 34 as a guide for determining whether someone has an ability to pay costs. As we have previously held, and as we again hold today: “[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person’s ability to pay LFOs.”* *Id.* at 839, 344 P.3d 680.

___ Wn.2d ___, 380 P.3d 459, 464 (2016) (emphasis added). Where a person is unable to provide basic necessities, “it is difficult to see how being unable to provide for one’s own basic needs - food, shelter, basic medical expenses - would not meet that standard. A person’s present inability to meet their own basic needs is not only relevant, but crucial to determining whether paying LFOs would create a manifest hardship.” *Wakefield*, 380 P.3d at 465.

Sadly, there is no record of whether Mr. Bostick is indigent as defined in GR 34 because the trial court never asked. The only question the court inquired of Mr. Bostick was whether he could get a job after he was released. 6/16/2016RP 6-7. There was no inquiry into Mr. Bostick’s overall financial status; any outstanding debts, current income prior to his incarceration, rent obligations, or other obligations which would affect his ability to pay LFOs. At best, the trial court’s

questions were rhetorical and designed for an affirmative answer resolving nothing regarding Mr. Bostick's ability to pay LFOs.

In addition, only the \$100 victim assessment, the \$500 DNA collection fee are mandatory fees that arguably could not be waived. *See State v. Mayer*, 120 Wn.App. 720, 726, 86 P.3d 217 (2004); *State v. Curry*, 118 Wn.2d 911, 917, 829 P.2d 166 (1992) (the Supreme Court has held that the victim penalty assessment is mandatory); *State v. Thompson*, 153 Wn.App. 325, 336, 223 P.3d 1165 (2009) (DNA laboratory fee mandatory). The other costs and fees imposed by the court were discretionary and could have been waived. The Filing fee was not a mandatory fee as only a \$200 jury fee is mandatory, and Mr. Bostick pleaded guilty, thus there was no jury. *See* RCW 10.46.190 ("Every person convicted of a crime . . . shall be liable to all the costs of the proceedings against him . . . when *tried* by a jury in the superior court") (emphasis added). Yet, the court failed to consider waiving these discretionary costs or even consider the impact that imposition of these fees would have on Mr. Bostick as required by *Blazina*.

The court's inquiry was wholly inadequate under *Blazina*.

- c. *This Court should exercise its discretion and find the inquiry here utterly incomplete.*

“National and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.” *Blazina*, 182 Wn.2d at 835.

We reached this issue in *Blazina* because we found ample and increasing evidence that unpayable LFOs “imposed against indigent defendants” imposed significant burdens on offenders and our community, including “increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.” *Id.* at 835–87, 344 P.3d 680 (citing extensive sources). Given that, and given the fact that the trial courts had not made an individualized inquiry into the defendants’ ability to pay before imposing the LFOs, we remanded to the trial court for new sentencing hearings. *Id.* at 839, 344 P.3d 680.

State v. Duncan, 185 Wn.2d 430, 437–38, 374 P.3d 83 (2016).

This Court has exercised its discretion and reached the *Blazina* issue in cases where there was no objection to the imposition of LFOs at trial, such as *State v. Cardenas-Flores*, 194 Wn.App. 496, 374 P.3d 1217 (2016). The defendant’s indigent status, the amount of LFOs imposed, and the likelihood that the defendant faced deportation as a result of her conviction were the reasons this Court gave for reaching the issue. *Id.* at 521.

Here, the court imposed attorney's fees, an entirely discretionary cost, that Mr. Bostick probably will never be able to pay. When Mr. Bostick is released, he will have felony convictions which will bar him from many jobs. He will receive no education while in DOC and will have limited skills hindering his access to decent paying employment once released. Lastly, Mr. Bostick was found indigent prior to trial remains so to this day.

This Court should exercise its discretion and reach the challenge to the imposition of the discretionary LFOs.

- d. *The remedy for the court's failure to inquire into Mr. Bostick's financial circumstances and make a finding of her ability to pay the LFOs is remand for a new sentencing hearing.*

Where the trial court fails to make an adequate individualized inquiry into the defendant's ability to pay, on the record, the remedy is to remand the matter to the trial court for a "new sentence hearing[]." *Blazina*, 182 Wn.2d at 839. This Court should remand Mr. Bostick's matter to the trial court for a new sentencing hearing.

F. CONCLUSION

For the reasons stated, Mr. Bostick asks this Court to reverse his sentence and remand for a resentencing.

DATED this 18th day of November 2016.

Respectfully submitted,

s/Thomas M. Kummerow

THOMAS M. KUMMEROW (WSBA 21518)

Washington Appellate Project – 91052

1511 Third Avenue, Suite 701

Seattle, WA. 98101

(206) 587-2711

Fax (206) 587-2710

tom@washapp.org

Attorneys for Appellant

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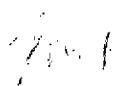
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 49427-2-II
v.)	
)	
NATRONE BOSTICK,)	
)	
Appellant.)	

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